UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust Litigation	File No. 18CV1776 (JRT/HB)
	Courtroom 14W Minneapolis, Minnesota January 28, 2019 2:03 P.M.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(STATUS CONFERENCE)

APPEARANCES

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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

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THE COURT: Good afternoon, everyone. Please be seated.

We are on the record for a case management conference -- it's always interesting being in somebody else's courtroom -- in In Re Pork Antitrust Litigation. This is being managed under Matter No. 18-cv-1776.

Let me start by getting appearances. And I think we did arrange for sort of a traveling mic for that purpose. I will ask first for appearances from everyone who is in the courtroom, and then I will take roll of the folks that I understand are appearing by telephone.

So shall we start with plaintiffs' counsel?

MR. CLARK: Your Honor, Brian Clark, Lockridge Grindal Nauen, for direct purchaser plaintiffs.

MR. POUYA: Good afternoon, Your Honor. Bobby Pouya of Pearson Simon & Warshaw for direct purchaser plaintiffs.

MS. SCARLETT: Good afternoon, Your Honor. Shana Scarlett from Hagens Berman Sobol & Shapiro for the consumer plaintiffs.

MR. HEDLUND: Good afternoon. Sorry. Good afternoon, Your Honor. Dan Hedlund, Gustafson Gluek, also

for the consumer indirect purchaser plaintiffs.

MR. RAITER: Good afternoon, Your Honor. Shawn Raiter, Larson King, on behalf of the commercial indirect plaintiffs.

MS. WEINER: Good afternoon, Your Honor. Melissa Weiner, Pearson Simon & Warshaw, for the direct purchaser plaintiffs.

MR. BRUCKNER: Good afternoon, Your Honor. Joe Bruckner from the Lockridge Grindal Nauen law firm for the direct purchaser plaintiffs.

MR. SIMON: Good afternoon, Your Honor. Bruce Simon, Pearson Simon & Warshaw, on behalf of direct purchasers.

MR. ROBISON: Good afternoon, Your Honor. Opposing counsel broke this, Your Honor. Good afternoon, Your Honor. Brian Robison with Gibson Dunn for Smithfield.

MR. HEEMAN: Good afternoon, Your Honor. Donald Heeman, Spencer Fane, for the JBS entities.

MR. BERNICK: Good afternoon. Justin Bernick from Hogan Lovells for Agri Stats.

MS. MILLER: Good afternoon, Your Honor. Britt Miller from Mayer Brown on behalf of Indiana Packers and Mitsubishi Corporation (Americas).

MR. PARKER: Good afternoon. Rich Parker from Gibson Dunn on behalf of Smithfield.

MR. DUNCAN: Good afternoon, Your Honor. Richard Duncan, Faegre Baker Daniels, for the Hormel defendants.

MS. STILSON: Good afternoon, Your Honor. Jaime Stilson from Dorsey & Whitney on behalf of Indiana Packers and Mitsubishi Corporation (Americas).

MR. RASHID: Good afternoon, Your Honor. Sami Rashid from Quinn Emanuel for the JBS defendants.

MR. NEUWIRTH: Good afternoon, Your Honor. Steven Neuwirth from Quinn Emanuel for the JBS defendants.

MS. ADCOX: Good afternoon. Rachel Adcox from Axinn Veltop & Harkrider for the Tyson defendants.

MR. STALLINGS: William Stallings for Indiana Packers and MCA.

MR. SCHWINGLER: Good afternoon. Peter Schwingler from Stinson Leonard Street for the Seaboard defendants.

MR. GREENE: Good afternoon, Your Honor. William Greene from Stinson Leonard Street for the Seaboard defendants.

MR. SUMMERLIN: Gene Summerlin from Husch Blackwell for Triumph Foods.

MS. COTTRELL: Hi there. Christa Cottrell with Kirkland & Ellis on behalf of Clemens.

MS. BRIESACHER: Hi. Christina Briesacher from Kirkland & Ellis on behalf of Clemens defendants.

THE COURT: Others in the back of the courtroom

who want to enter an appearance?

MR. KVINGE: John Kvinge from Larkin Hoffman for Smithfield.

MR. COTTER: Good afternoon, Your Honor. John Cotter from Larkin Hoffman for the Smithfield Foods defendants.

MS. RIDER ROHRBAUGH: Good afternoon, Your Honor. Tiffany Rider Rohrbaugh from Axinn Veltrop & Harkrider for Tyson defendants.

MR. COLEMAN: Craig Coleman from Faegre for Hormel.

MR. HALL: Isaac Hall from Faegre for Hormel.

THE COURT: Okay. And I believe we have perhaps just two counsel -- because, Mr. Kvinge, I think you were initially identified as somebody who might be appearing by telephone, but you are right there.

I believe we have got someone on the phone on behalf of Triumph; is that right?

MS. SCHEIDERER: Yes. Megan Scheiderer, Husch Blackwell, for Triumph Foods is on the line.

THE COURT: And then someone for Tyson? Is Lindsey Strang on the line? Okay. Is anyone else --

MS. STRANG: Yes, I am on the line.

THE COURT: Okay.

MS. STRANG: Thank you.

THE COURT: Is anyone else appearing by telephone and want their appearance noted?

MR. PEARSON: Good afternoon, Your Honor. Michael Pearson from Pearson Simon & Warshaw on behalf of the direct purchaser plaintiffs.

THE COURT: Anyone else?

MR. CUNEO: Jonathan Cuneo, Cuneo Gilbert & Laduca, for the indirect commercial plaintiffs.

THE COURT: Anyone else?

All right. I think we have got the full roll call here. And the record will reflect the hardiness of all of you who actually braved the elements to be here, I understand not only this afternoon, but at the hearing this morning as well.

Let's talk a little bit about the way we are going to proceed this afternoon. I've got your status report from December 12th. I've got your agenda that was filed on January 24th. The status report was -- I am sorry -- was filed on December 12th, Document 233. Your January 24th joint status report was Document 257. So those are the primary documents that I am working with. And I will try to note where I am referring to something else, and I would ask that you do the same.

Also, even though you have all introduced yourselves, since I haven't memorized everybody's names and

certainly our court reporter hasn't had a chance to do that, I will ask that when you come to the podium to address a particular issue, please again introduce yourself and state the party that you are representing here this afternoon.

Moving on, my understanding from your January 24th status report is essentially that you recommend using the December 12th status report as sort of the topic outline.

What I am wondering is, Are there any topics not addressed there that you all have agreed you would like to raise today? So no ambushing, no sandbagging, but have you talked amongst yourselves and identified other topics that weren't mentioned in that status report that you would like to bring to my attention today? I am seeing no nodding heads on that subject.

All right. With respect to the motion to stay, I will be doing a written order on the motion to stay just to close the loop on that.

I tried to signal at the previous case management conference where I was headed at least conceptually. And I think everybody understands, and in fact I don't think anybody argued to the contrary, that there won't be either a complete stay of all activity or a full court press on all fronts while the motions to dismiss are pending. So, of course, the question that you all have been working on is where in that broad middle range of interim activity we

ought to land. And I do appreciate the work you have done to try to reach agreement on a number of those things.

Let me just ask a checking question on that subject. Have there been any other agreements reached since your December 12th status report? I know your January 24th report said nope, that's it, but hope springs eternal. Any other disagreements or disputes that have been resolved since then?

MS. SCARLETT: No, Your Honor.

MS. MILLER: No, Your Honor.

MR. ROBISON: No, Your Honor.

THE COURT: So I'll go through the remaining areas of dispute then as we proceed through the status -- through the status report and the status conference this afternoon.

With respect to the areas of agreement, I have got a couple of checking questions. I certainly don't want to look any gift horses in the mouth, but a couple of things just to make sure that I understand what it is you have agreed to.

First, with respect to the agreement concerning holding companies, are the holding companies involved and is it the intent that the holding companies will be involved in any of the discovery-related discussions that have been described in the rest of the status report or that, with respect to the holding companies, all of that work will

essentially be deferred until a decision on the motions to dismiss?

MS. MILLER: Your Honor, I can come to the podium or I can stay here. Your choice.

THE COURT: The podium?

COURT REPORTER: Yes.

THE COURT: Okay. Thank you.

MS. MILLER: Good afternoon, Your Honor. Britt Miller on behalf of IPC and MCA.

It is our understanding that at least with respect to those four companies they will not be participating in discovery unless and until such time as their involvement has been determined by the motions to dismiss, with the understanding that in the event they are kept in the case we will work promptly to catch up with the others.

THE COURT: All right. Any different understanding from the plaintiffs?

MS. SCARLETT: Shana Scarlett from Hagens Berman for the consumer indirect purchaser plaintiffs.

That is the understanding, but also it is our understanding that none of the preservation obligations go away, that those will all still stay in effect.

THE COURT: That's my understanding, and I see counsel for the holding companies agree.

All right. Second, with respect to the areas of

agreement on the ESI protocol -- and let me start just by putting a couple of sign posts on the record about documents that I am referring to. The underlying, kind of, original draft ESI protocol that we may be referring to over the course of the afternoon, as I understand it, was Exhibit C to the materials that you filed on October 30th in advance of the previous case management conference. I believe that's ECF 203-1, beginning at page 34. So I have got that. Then there were some additional agreed terms that were reflected in your December 12th status report that are specified in ECF 233-1. And then, of course, identification of and discussion of the disputes and the parties' respective proposed language with respect to those disputes, and those are also in the December 12th status report at 233-1 and 233-2. So those are the documents I have in front of me to inform that part of our discussion.

Is there anything that you all may be referring to that I didn't just mention on that issue?

MS. MILLER: No, Your Honor.

MS. SCARLETT: No.

THE COURT: I don't think so. Okay.

So with respect to, sticking with the areas of agreement for just a moment, with respect to the term on relevancy redactions, which was paragraph II(K)(2) of the proposed ESI protocol, I took a look at the revised language

you sent back and compared it with the suggested language I had come up with and it appeared that the difference was that you all had agreed to strike my subpart or sub-subpart (3). That was the only language difference I saw.

Did I miss some other change?

MS. MILLER: No, Your Honor.

THE COURT: No. All right. We have got that then.

I have reviewed and I've noted the other provisions on which you reached agreement in the ESI protocol. We will talk about the disputed areas, but then one of the deliverables following this conference that I am going to ask for is a revised proposed ESI protocol that incorporates your agreements and also incorporates language based on the guidance that I will be giving you this afternoon. It seemed like an almost certainly more accurate way to generate a final product for me to sign off on and enter than if I am sitting there trying to cut and paste agreements and other things into the draft that you had previously sent. So just this little head's up that that's one of the things I am going to be asking for when we are done.

Also on the subject of eventual deliverables and proposed orders, the plaintiffs had proposed an order, I think called Order Regarding Disclosure of Information. It

was an attachment to your memorandum in opposition to the motions to stay. I believe it was at tab E, ECF 205-2, beginning at page 24. We talked through that in some detail at the last conference. I think I gave pretty clear direction about where I wanted you to go with the subject matter of that. What I didn't know is and what wasn't discussed here was whether anyone believes there is still a need for a written order on that subject matter, or are you on track and able to work that through without a separate written order?

MS. SCARLETT: For the clarity of record, Your Honor, I think plaintiffs would appreciate an order.

MS. MILLER: Your Honor, for defendants, reasonable minds can disagree, but it's not entirely clear I believe to the parties exactly what portions, if any, defendants are intended -- don't believe that any of that order is appropriate, as we have already discussed at the last status hearing, but, yes, we would appreciate an order directing what, if any, part of that needs to be done.

THE COURT: Okay. Well, I guess what I was curious about is that there were a number of areas in that order where the parties were already working together, such as to provide organization charts and that kind of thing. So I didn't know to what extent there had been continuing efforts to narrow those differences or whether things just

stand where they stood at the time.

MS. MILLER: Your Honor, they stand where they stood. The parties have exchanged disclosures, and the defendants have produced organizational charts, but there has been no further discussion on those topics.

THE COURT: All right. Thank you. I appreciate that clarification.

Okay. Then returning to the status report and the areas of dispute addressed in the status report, the first item has to do with Rule 34 requests for production. The parties -- and let's assume, based on the clarification I got with respect to the holding parties, that this discussion does not apply to the holding parties unless you tell me differently. The parties have, based on the discussions you have had since the last conference, you agreed to specific RFPs that are described in your status report that would be the subject of interim discussions, but you disagree on what -- kind of how far those discussions ought to go. So I do have some follow-up questions to make sure I understand your respective positions.

So let me get counsel for plaintiff, plaintiffs up.

MS. SCARLETT: Shana Scarlett for the consumer and direct purchaser plaintiffs.

THE COURT: One of the things I wanted to

understand better is what your proposal contemplates regarding the finality and completeness of the written objections and responses.

Now, it's my understanding that by responses you don't mean like documents on the barrelhead, because everybody has agreed that that's going to be deferred. But when you are asking for a deadline by which objections and responses would be made, whether or not Judge Tunheim has ruled by that time on the motions to dismiss, tell me a little more about what your vision for that is. What is it you want to get?

MS. SCARLETT: Absolutely, Your Honor.

So after serving the Rule 34 requests, in the normal course of discovery what we would get back would be a set of objections and responses by each particular defendant outlining not only the contours of what they believe are off limits for discovery, but also their commitment to produce, if any. And at times there is also a description of the location where they would search. For example, a defendant may say that a particular request -- they have documents responsive to that that can be found in a centralized location. Customer contracts, for example. And they will make the objection perhaps the time period they will withhold privileged documents, and then they will say we will produce documents from the centralized location of

these customer contracts. That's the type of objection and response that we can then meet and confer on and reach at least the contours of the agreement, understanding they are not going to produce them, but this is also the type of investigation they would need to undertake in any event for preservation. When we ask for the customer contracts, they need to talk to their clients and find out where those customer contracts are. And if the answer is we will produce customer contracts, they are not in a centralized location, they are going to be found in custodial files, and we are not objecting to production, we understand they are critical to the case and we will produce them, such as custodial and search term agreements, and then that's the response as well and we can have that discussion. It is clear in the objections and responses, and we are able to at least move forward in discovery.

We understand that the set of responses are not final and forever. We understand that during the course of discovery when the doors open up on discovery a defendant may find out, well, it turns out that there was no centralized file, it turns out whoever spoke spoke incorrectly or there is only a small number. So, of course, we are used to getting supplements under the Rules of Civil Procedure. Of course, we are used to having further discussions where what was thought to be true at the outset

of the case turns out not to be exactly right.

THE COURT: Does that also then contemplate the idea that if the objections are made on one premise and then as a result of Judge Tunheim's order on the motions to dismiss the premise is changed, that the objections and agreements regarding scope could also change or at least that the defendants' position on that could change as well?

MS. SCARLETT: So I don't -- I think that's true. There are global issues that I think could change. So, for example, there could be a class period that's narrowed on a motion to dismiss. Sometimes we see that. So there could be a placeholder of we agree to produce for the alleged class period, but if the motion to dismiss order comes out and your class period ends up being shorter, then the agreement is we will produce for that period and, you know, whatever, two years prior, whatever it ends out working out to be.

In terms of the different, other types of scopes of what a motion to dismiss order could look like, I am hard-pressed to see how it really changes the core relevancy of some of the documents, like customer contracts or things like that. I think that it could change the identity of the defendants. For example, if some of the parent shareholder defendants are victorious on their motion to dismiss, that might change things. Class period. But other than that, I

don't know exactly how it is the defendants think that the shape of the motion to dismiss order would truly change the core discovery that we are asking for in the agreed-upon requests.

THE COURT: Okay. But at least at this point you contemplate that there could be caveats, that even if they went forward with these responses and objections, there could be caveats, say, well, you know, if this -- we're making this objection on this assumption, but if this assumption changes, then we reserve the right to revisit this.

MS. SCARLETT: And that's certainly how it worked in the broilers litigation. For example, there was one defendant that had a type of chicken that it was absolutely certain was going to be dismissed from the case, and they brought a separate motion on this grounds. And so -- you know, I was one of the counsel involved in those meet and confers. And so everything was carved out with the understanding that if they were victorious on their individual motion to -- the motion to dismiss on the type of chicken, then they would not be responsible for producing documents that related to that chicken. They ended up losing the motion to dismiss, so they did produce, but that was absolutely an understanding that was placed during the discovery conferences.

THE COURT: Thank you.

MS. SCARLETT: You are welcome.

THE COURT: Who would like to address this for defendant?

MR. ROBISON: Thank you, Your Honor. Brian Robison with Gibson Dunn. I am here on behalf of Smithfield, but I am speaking for all the defendants, other than the parent companies, on this particular issue.

Your Honor, the parties have made a lot of progress since we were last before you in November. In November the parties had what you called sort of an all-or-nothing approach on these Rule 34 requests. The parties on both sides read you loud and clear. You were not overly thrilled with the all-or-nothing approach and asked us both to go back and look at the 46 document requests that the plaintiffs had served on the defendants to see if there were any that the parties agreed could fairly be discussed at some level while the motions to dismiss were pending. We have reached agreement that 32 out of the 46 document requests are things that we can discuss at some level while the motions to dismiss are pending.

Now, the area of dispute is, as you framed it exactly, what are we going to be talking about? What level of detail do we get into? The defendants think for two reasons giving written objections now makes no sense.

Number one, it is premature. Number two, it is going to lead to duplication of effort. It is premature for us to be serving formal written objections and responses now when we don't know the scope of the case. We don't know if exports are going to remain in the case. We don't know how many years of damages will be available. We don't know what piece of the conspiracy, if any, Judge Tunheim is going to find to be plausible. So before we know the scope of the case, what we will do, as Your Honor sort of previewed, is serve incredibly lengthy responses to each of these 32 document requests where we put in all sorts of caveats. One particular defendant might agree to produce some category of documents, if the motion to dismiss ruling says X. They might put in an objection if the ruling said Y. But no one knows right now. We are all in a vacuum. We are kind of in the dark.

So instead of putting our clients to the incredible expense of having to serve these contingent, caveat-filled responses, what we propose is something different. What we propose is that we talk to the plaintiffs. We're not refusing to talk. That's exactly why we agreed to talk about the 32 document requests. Talk to them about the global issues that opposing counsel mentioned. There would be global issues. There may be requests, for example, where the plaintiffs have asked for

all documents in some category where we think for various reasons we may be able to convince them that documents sufficient to show a particular point would be sufficient for their needs. Those are the sorts of things. We may be able to talk about particular relevance issues. There may be proportionality issues. But a lot of these are hard to crystallize until we know what, if anything, remains in the case after those rulings.

And the second point we would make does feed off this Chicago -- there are actually two broiler cases. They talk about the one in Chicago. There is another one in Oklahoma where there was zero discovery, and the court there granted a motion to stay all discovery. And the briefing in that Oklahoma case relates some of the horror story that had come out of Chicago, the hundreds of pages of briefing on discovery disputes, six-hour status conferences, a lot of things throughout that docket sheet that show all of the extra work that was generated about what happened in Chicago. But in Chicago what the defendants had to do was then redo all of these objections. After the ruling came out -- there wasn't just one defendant -- multiple defendants had to redo their objections to tailor them to what the court ruled.

And so one thing we are trying to do here is be reasonable, meet the court's desire to do something while

the motions are pending to get the case moving, but not duplicate work, not force our clients to do this twice.

THE COURT: Anything further?

MS. SCARLETT: Just addressing that last point, first of all.

In the broilers litigation there was no redo when the motion to dismiss order came out. What happened was after a series of meet and confers between the plaintiffs and the defendants, where after a little bit of motion practice and a lot of discussion we finally reached agreement on what the offers of production would be, the defendants amended their responses to have them reflect those offers of production or they provided them in a separate document, but that was just to crystallize for the parties what had been agreed upon. There was very little redo after the motion to dismiss order that I can recall at all.

And just to address one specific other point raised by opposing counsel, which is it's difficult for us as plaintiffs to see how much progress we can make in a group-wide meet and confer situation with the defendants, unless there are particular issues like, for example, how much pre-class period discovery they think we are entitled to, how long data production should go for. It is very difficult to have the type of relevance and burden arguments

that we have in discovery conferences on a group-wide basis with all eight defendants, all of whom have different clients, different burdens, different methods of storing documents, and all of whom are going to have to undergo their own investigation for preservation issues separately. So the proposal from the defendants that we have group-wide meet and confers on these discovery requests, from the plaintiffs' perspective, is little different than the discovery stay they were asking for months ago.

THE COURT: Okay. I am going to let that issue percolate. I will give you an answer before the end of the afternoon, but I am going to let that sort of bubble around in the back of my head for a bit and maybe even take a break at some point before we wrap up, but why don't we move on to the issue of the ESI protocol.

The first area of dispute has to do with the time period that would be for processing data or the scope of data that would -- the temporal scope of data that would be processed. Now, that is paragraph Roman numeral V(A)(1).

And just so I understand the plaintiffs' proposal here, my understanding is that the implication in this context of the time period is that -- well, actually, rather than tell you what I am assuming it is, let me ask the question. So who is going to be, okay, dealing with this particular issue?

MR. POUYA: Bobby Pouya for the direct purchaser plaintiffs.

THE COURT: What I want to understand is, is the point of the proposal that the data would actually be processed now; or are you trying to reach agreement about once the switch gets flipped on discovery, if the motions to dismiss are denied, the parties would already have reached agreement about the temporal scope of what gets processed?

MR. POUYA: The primary concern at this point is preservation and ensuring that we have guideposts for what needs to happen once the floodgates open. And from our perspective, it is important that we have a date that we are talking about in terms of the nonstructural data, that we're on the same page, so we're talking about -- the other things that we're going to talk about potentially, which is what data sources are being preserved, what custodians are potentially at issue in the case. All of those related-type issues will not crystalize until we know what time period we are talking about.

So all that we are asking here is that for the purpose of the ESI protocol that there be a definite time period, and we propose January 1st of 2007. I believe it's appropriate. Defendants have not proposed any starting period, and that's the problem, is we don't know where they are going back to or what they are considering to be

potentially relevant. So for the purpose of having something in the ESI protocol, just like all the other provisions that have been put in there, we believe the time period should be January 1st, 2007.

THE COURT: Yeah, I guess I see the question of what gets preserved to be a bit different, though, from the question of what gets processed. And my understanding of your proposed Roman numeral V(A)(1) was that it was a commitment to processing data within a particular time frame. Maybe I am misunderstanding, but it did strike me that that was somewhat different from reaching an understanding with the defendants about the scope of data that they would be preserving in the event it needs to be collected, processed, et cetera.

MR. POUYA: Sure. And I think there's certainly overlap between both of them in terms of the data that would need to be not only preserved, but processed and collected. I think there needs to be an understanding of what those guideposts are as we're going through the meet and confer process and while we're putting pen to paper on the ESI protocol.

THE COURT: Okay. Are there -- I didn't believe there are, but are there still outstanding disputes about preservation? My recollection from the November case management conference was that there was just one issue

still in dispute that you were working on and that I think the December -- I think the December 12th letter indicated that you had resolved. So are there still disputes about preservation? I am seeing shaking heads from the defendants' table.

MR. POUYA: Well, I don't know if you would call them a dispute, but we believe that there's a discussion that needs to be had.

As Your Honor indicated during the previous hearing, the defendants will always say they're preserving documents and they're aware of their obligations, but it's important from plaintiffs' perspect to have a discussion regarding the data sources that they are preserving, the potential custodians that they are preserving, so we can become -- we can have discreet understandings and get on the same page of what those obligations are, whether it relates to custodians, whether it relates to cell phones and devices and whether it relates to data sources. So not just focusing on the time period issue, but I think the issues that are being presented to you today are along those lines, where we want to have those discussions and understand what they are actually preserving and how they are preserving it.

THE COURT: All right. Let me hear from the defendants.

MR. ROBISON: Your Honor, Brian Robison again for

the defense group.

First up, in November the only question was about whether devices of certain senior executives of each of the defendants had been imaged or otherwise preserved, locked in a drawer, et cetera. And you are exactly right; at the November conference counsel for both sides said there were no other questions about that. So the imaged devices of these senior executives is an issue that's been taken off the list. Everything has been resolved. That's done.

Now, getting down to this piece of the ESI protocol, the defendants' position is that the court should not prejudge what the relevant period of discovery is going to be. That is a hotly disputed issue. All morning there was discussion on these motions to dismiss. The statute of limitations period, the proper damages period, if any, was hotly disputed. It is going to continue to be disputed. The defendants are not asking this court to pick a start date. We're not asking the court to pick our side in the start date debate. The plaintiffs are. The plaintiffs are asking this court to choose January 1, 2007, as the start date of discovery, even though that's a disputed issue right now.

If the concern is preservation, that is not a concern, because I can represent to you that the defendants' hold notices, the litigation hold notices, either are not

date restricted or they go back to January 1, 2007. So this court does not need to put its power behind an order that endorses the plaintiffs' view or the start date of discovery because of some preservation issue. The defendants are not taking the view that something from 2007 or 2008, if it's otherwise relevant, otherwise being preserved, doesn't need to be preserved anymore.

So, again, this is a disputed issue in the case. It is going to be disputed for sometime. And another reason we think it's inappropriate to pick a January 1, '07, start date is that, depending on how these motions to dismiss are decided, there may not be a one-size-fits-all answer for a discovery start date. There may be some document requests that later on, depending how Judge Tunheim rules, the court decides should start with January 1, 2007. There may be other document requests based upon, again, proportionality, the motion to dismiss rulings and other factors, burdens, et cetera, the court decides there should be a different discovery period.

So, again, at this time when we are still in the dark, we don't know how the motions to dismiss will be decided, when there's not a preservation risk because of the way the defendants have agreed to preserve documents, there's no need for the court to take sides on this start date issue. And it's something that should be decided, we

think, later on through meet and confers on a request-by-request basis; and if the parties can't agree later on, then obviously we bring it to the court and the court calls the balls and strikes as it sees fit.

THE COURT: Thank you.

On this one, as long as there's not a dispute, and there doesn't appear to be a dispute about the idea that data should be preserved going back at least to January 1, 2007 and forward, then I'll kind of go with defendants' proposal on the issue of the time period. I do think it makes sense to defer that issue of what that beginning bookend for processing data ought to be until after the motions to dismiss are decided. And I do also agree that it could vary from defendant to defendant and potentially could vary with data sources or custodians. Hopefully, it won't have to get quite that far into the nitty-gritty, but I can't -- right now I don't think we do know enough to say that all data beginning with January 1, 2007, through June 18, 2018, must be processed. So I am going to go with defendants' proposal on this particular one.

Just to be clear, and then I think that defendants' argument essentially underscored this, I am not saying that I wouldn't ultimately agree with plaintiffs' position on look-back, but I do think that Judge Tunheim's decision on the motions to dismiss are going to be a valid

data point in this discussion and I think we need to wait for that with respect to this particular issue.

Moving on to another area of dispute and that is document custodian and noncustodial data sources, which is paragraph Roman numeral V(A)(2)(a). On this one, let me tell you where I am going with it right now, and I will give the parties a chance to let me know if they think I have just totally misunderstood something as opposed to simply disagreeing with me.

I am inclined to agree with the plaintiffs on this particular issue. I don't see why the parties can't and shouldn't begin discussing in earnest custodians and noncustodial data sources, even for the entire 11-year period that the plaintiffs believe ought to be fair game and in scope. And I do believe that this will be an important step to materially advancing your readiness to move forward with discovery if and when one of these cases or more of these cases moves past the motions to dismiss.

I totally get that there may be some effort and probably some significant effort on defendants' part that in the end could prove to have been unnecessary, but I am not persuaded when it comes to this particular topic that that risk outweighs the benefit of getting an early start on that conversation.

I believe that a good point of what you need to

know you've had to figure out anyway to get your preservation ducks in a row, and it wouldn't surprise me if a good part of what you need to know might not have changed materially over that period. But to the -- let me provide a qualifier here -- to the extent it has changed and if defendants or particular defendants run into a specific situation where it would in fact, to quote from your -- part of the position letter, be extremely costly to canvas a historic ESI system to identify custodians and sources from 11 years ago, then bring that concern to plaintiffs' attention and it may be that you can reach agreement to table that extremely costly part of the effort, but while moving forward with discussions on the rest.

So qualified by that sort of -- I'm not sure what to call it, but little caveat, I am going to accept plaintiffs' proposal on this particular topic. That's where I am 95 percent sure I want to go with it.

Am I misunderstanding something that somebody wants to make sure and get on the record beyond what you had in your letters?

MR. ROBISON: Your Honor, again, Brian Robison for the defendants' group.

Just a point of clarification, I guess. We are obviously prepared to talk about custodians to some level because we've served organizational charts and we've served

initial disclosures, and those list people with knowledge of relevant facts, those list categories of documents that may be relevant to the case.

I guess one point of clarification would be, and this is something we put in our written paper, that there is a -- that there is a difference between saying, for example, there's a backup tape that's sitting on a shelf in the IT department and it's being preserved versus having to spend six figures with vendors and lawyers to attempt to load that backup tape into a system, get it hosted, get it indexed and try to figure out what exactly is still on that backup tape and what's readily accessible for discovery.

And so, in our view, taking that first step and identifying backup tapes that might be readily accessible, depending on technology, what a vendor may be able to do eventually, depending on Judge Tunheim's rulings, makes sense. I am asking for clarification on how far into backup tapes and 11-year-old ESI structures the court exactly wants us to go, because that is something that we discussed briefly in November and I don't know that we've delved into exactly what those burdens would be.

THE COURT: Well, I understand that and I realize we will -- we will have to cross that bridge at some point, but the specific language proposed in, you know, in your Exhibit B, ESI protocol disputed positions, which is

Document 233-2, page 1, the plaintiffs' proposal was the parties -- and this is for inclusion in the ESI protocol -- the parties and the court will discuss the timing for commencing with document custodian and source discussions and address that issue in a separate search methodology order or in an amended ESI protocol. And the defendants' counter was, The parties will not commence with the identification of custodians or sources. And all I am saying is you will commence.

MR. ROBISON: Okay.

THE COURT: You will have that discussion. If, as you have that discussion, you get into some levels of detail and you have a disagreement about whether it is feasible now to get that -- to go down a particular road, try to work it out. If you can't, then we will have that conversation, but I want you to start that conversation. I want you to start it, taking into account the 11-year period that the plaintiffs believe is relevant, so I don't want you to cut that off, and see how far you get with it.

MR. ROBISON: Okay. Thank you, Your Honor.

THE COURT: Moving on to areas of dispute still in the ESI protocol, document custodian cell phone data. This is paragraph Roman numeral V(E)(1)(a).

On this one I have got a question. Actually, I have got -- I have got -- my first question actually is for

defense counsel, and then I may have a follow-up question for whichever plaintiffs' counsel is going to address it.

So who is on the hot seat for this particular one?

MS. MILLER: I drew the short stick on that one, Your Honor. Britt Miller on behalf of defendants.

THE COURT: All right. I thought maybe you just won the arm wrestling contest.

MS. MILLER: I wouldn't even presuppose to try to do that.

THE COURT: So I guess what I want to understand in this is a similar question to the one I had with respect to the issue of the time frame for data, and that is the information that plaintiffs have described in their proposed subpart (a). What I want to know from defendants is, Is all of that information going to be preserved? Now, I know that they've asked that it not only be preserved before culling, but that it be disclosed before culling. But what I want to know is, Is all of that information going to be preserved by defendants so that if down the line there arose issues that called for that information you would have it?

MS. MILLER: It's my understanding, Your Honor, as Mr. Robison said a moment ago, all of the defendants have instituted legal holds that either are not limited in time or go back at least to January 1st, 2007, and they are broad enough to encompass data that would be encompassed on a cell

phone. So we certainly believe that information is being preserved. Obviously, there are some questions, if there is a former employee who no longer works with us or works for any of the defendants, whether or not we have the ability to say that that information is necessarily preserved. Those are independent questions. If plaintiffs are particularly concerned about cell phones and are concerned, as they said in their papers, that independent employees might in fact destroy something, if defendants need to issue a reminder specifically calling out cell phones so that those that are on legal hold will be reminded yet again to preserve that data, we can certainly talk about something like that. But going to each potential document custodian's cell phone and identifying the name of the phone carrier, the type of the phone, the list of installed communications, the different ephemeral messaging applications, that's an incredible undertaking that goes to whether or not these types of information would even be produced; but if the cell phone data as a whole is covered by the legal hold, which we all believe it is, then that information should be being preserved during this period.

THE COURT: One of the -- well, in the language proposed by plaintiffs it was -- I mean, it seems to me that one of the key clauses is prior to any culling of the cell phone data. Now, obviously, they want disclosure, but what

I want to make sure is this is not just about whether it's being preserved now while you wait to see what's going to be in scope and what you are going to be ultimately able to produce. This is also about whether at any point in discovery, as discovery evolves, as issues arise, as disputes arise, whether you would be able -- you know, whether the necessary steps will be taken and whether the ESI protocol ought to require that you would be -- that you could, if necessary, generate a list of cell phone numbers used by the document custodian for work purposes, the name of the phone carrier that provided service, the type of phone, the list of installed communications applications, and whether or not the producing party claims that a cell phone used for work purposes isn't within its possession, custody and control.

So I guess I am probably -- but I want to hear from the defendants -- probably persuaded that you don't need to disclose that up front, but I do want to make sure that, at least, that it's clear in the ESI protocol that throughout the litigation the information requested in that list of (a) through (e) will be preserved and would be available to be produced if it became appropriate and discoverable.

MS. MILLER: Certainly, Your Honor. And to be sure, as we discussed at the November hearing, for the

identified executives that plaintiffs have already culled out for each of the defendants, the parties have reached agreement on the specific steps of preservation to make sure that all of the information that is contained on those cell phones or otherwise has been preserved, so at some point, presumably, we could catalog if we went into the phone and determine all of this information. Presumably, as the parties begin to discuss document custodians, we could then address whether or not those could -- we similarly have that information that could be catalogued. There is no intention on the part of defendants to say, okay, once, you know, we've decided on these six custodians, everybody else's stuff could be dumped. I don't think that anyone is going to take that position. If there is preservation limits that need to be discussed, they can be discussed as appropriate, but the focus was going to be on document custodians and making sure we can produce this information; and if there are other potential custodians in question, we can discuss how much information needs to be preserved; and if this is one of the things that needs to be preserved, we can discuss that as it goes forward.

THE COURT: Okay. All right. Thank you.

Let me hear from plaintiffs on this.

MR. POUYA: Bobby Pouya for direct purchaser plaintiffs.

Your Honor, the point here is that on provision (a) it obviously doesn't apply until there is culling of the documents. So we're talking about this -- this is something that will be triggered once the production occurred. It's not something that needs to be disclosed now.

THE COURT: Right.

MR. POUYA: We believe that at that point having it in the protocol and then having the disclosure is important for two reasons: One, having it in the protocol ensures that defendants are aware of these obligations and they will comply with them; and having it disclosed once the production is made, it develops our understanding of what was done and what was looked at it and what is being produced. It allows -- it provides transparency for us to understand whether we received a complete production and to understand what was produced. So that's why the provision is in here. We don't need to do it later. They are saying these categories would fall within their preservation obligations to the extent that they can do it. So there's no reason not to have it in the protocol now.

THE COURT: All right. Give me just a moment. I may have a follow-up question on that. I want to check something. All right. No. I think I understand. Thank you.

MR. POUYA: Thank you, Your Honor.

THE COURT: Anything further?

MR. ROBISON: Just briefly, Your Honor. Brian Robison again.

If what we are talking about is a disclosure of information about cell phones to the plaintiffs, I think that's a quite different question than whether that is being preserved and whether the document holds are preserving it. I don't understand the request for disclosure of this information. To me that just sounds like free discovery. If they want to spend deposition time or if they want to spend interrogatories asking about name, rank and serial number of particular custodian cell phones, that's fine, but I don't see anything in Rule 26(a) or any other rule of procedure that requires us to take on the burden and expense of getting all this detailed information about custodians' cell phones and disclose it to the plaintiffs.

So our position is, as Ms. Miller talked about, we agree that this is a potential source of discoverable information for particular custodians and we have taken reasonable steps to make sure it is preserved, but we do object to the plaintiffs' request that we just disclose this information to them outside the normal course of discovery.

THE COURT: All right. On this one I agree with defendants' position in that I think that -- with one exception that I will get to in a moment -- the disclosure

sought to be required by plaintiffs' proposal do go beyond what is required. The exception is subpart (5). I do think that it's important for purposes of transparency to be clear with respect to any identified document custodian whether the producing party is taking the position that a particular cell phone that that custodian used for work purposes isn't within its possession, custody and control. So I think that does need to be disclosed.

With respect to the others, I think it would be appropriate and I think it would get to the concerns expressed by plaintiffs' counsel if the ESI protocol clearly states that this other information will be preserved and that that is information that will be considered by the defendants as part of their due diligence to assure that those sources are evaluated and considered as a potential source of data. So to the extent that what you are looking for is something explicit in the ESI protocol, it says, oh, by the way, make sure you are checking these things, the defendants are saying we will, we get it, but I don't think -- I think it makes sense to include those explicitly as information that ought to be preserved and considered. But I think it goes a step too far to say that it needs to be disclosed out of the blocks, until and unless there is reason to believe that something hasn't been done by defendants that ought to be done and you are looking at

trying to understand whether there needs to be some additional or alternative means of discovery or, heaven forbid, sanctions.

Any questions about that particular piece, that subparagraph (a)? Okay.

Now, I wasn't clear on whether the parties had a dispute about the remaining paragraphs (b) and (c). Your discussion just identified (a) as the dispute, but your language for (b) and (c) is different as well, although I wasn't sure if it was different in concept, you know, whether the little thought bubbles over your respective heads were different or whether it was just a difference in the number of words you used to describe those concepts.

So can somebody tell me whether you've got a dispute on (b) and (c) or not?

MS. MILLER: Your Honor, Britt Miller on behalf of IPC and on defendants.

From the defendants' perspective, again, this all goes into the category of what has to be disclosed as opposed to what needs to be preserved. Certainly, the defendants would consider, in looking at -- in determining whether or not there is actually responsive or potentially discoverable information, whether or not individual applications were used for business purposes, whether they contain unique and responsive nonprivileged communications,

the point being we are not going to withhold them as privileged and/or illegal to produce under the privacy laws. So ours go to, again, the question of what we will consider and what will be withheld when it is ultimately decided that we are going forward with discovery. As I understand it, it's the -- the plaintiffs' position is that we have to affirmatively undertake all of this to identify each of these -- each of these pieces of information and disclose that information as part of the discovery process. So we read this provision as covering all of these things. It's a question of disclosure versus preservation. And that to the extent that there are -- any of these communications are ultimately going to be produced, the parties will meet and confer to the extent there are any issues in terms of production or format.

THE COURT: As I read plaintiffs' proposal, and I will obviously give plaintiffs' counsel an opportunity to tell me if I am misreading it, but looking, for example, at their proposed paragraph (b) it says -- which is on page 2 of Document 233-2 -- it leads off with, A producing party will review the following sources of information on a cell phone to the extent reasonably available to identify unique, responsive and discoverable information. And then it specifies the kind of information that the producing party will review to identify unique, responsive and discoverable

information. So that struck me as relatively noncontroversial. But what am I missing?

MS. MILLER: I think the point, Your Honor, we didn't take issue with the fact that as part of, ultimately, as part of discovery, certainly, we will look at those applications that were used for business purposes and that do contain -- we use the same language on both sides -- contain unique, responsive and nonprivileged communications. So I don't think that's the issue. It's the -- from our standpoint, we understand our obligations with respect to the things that are on cell phones. Not every cell phone has call and voicemail logs and text messages, so we may not be able to review some of this stuff or it may be in a format that we can't access.

THE COURT: Right.

MS. MILLER: It's a question of we understand that we have an obligation to look for documents where we reasonably expect to find them, whatever that may look like and whatever media they are stored on, but the level of specificity puts an obligation on defendants which we don't believe is called for, specifically with respect to cell phones, or as set forth in the federal rules. We will undertake our obligations to identify that information that is potentially relevant and those sources that are reasonably accessible, but beyond that what plaintiffs are

asking for from defendants' perspective is overkill.

THE COURT: All right. Let me hear from plaintiffs.

MR. POUYA: So, Your Honor, our subsection (b) under this provision is intended to provide clarity on things that need to be reviewed in the context of reviewing and producing cell phone information. What I didn't hear defense counsel just say was that any of the categories here are controversial or something that should not be reviewed and produced to the extent that it exists, and that's exactly what the provision calls for and what we are asking for here. Cell phone call and voicemail logs should be reviewed. Text messages should be reviewed, and contacts should be reviewed. We believe that having it in the protocol specifically is helpful to ensure that it happens and the parties are on the same page.

THE COURT: Just as a formatting question, on my copy -- and I am assuming it is on everybody else's since it was the version that was filed -- contacts is identified as (c). Should it instead have been romanette (i) -- or romanette (iii)?

MR. POUYA: I believe so, Your Honor.

THE COURT: Okay.

MR. POUYA: That's the way I read it.

THE COURT: So the contacts is the third subpart

of your proposed paragraph (b)?

MR. POUYA: Correct.

THE COURT: Okay. All right.

MS. MILLER: And, Your Honor, if I may briefly?

THE COURT: Yes.

Do you have anything further on that, Mr. Pouya?

MR. POUYA: No, Your Honor.

THE COURT: Okay.

MS. MILLER: Your Honor, again, I think this is a question of language, but we have -- defendants, as I said before, understand that they have an obligation to look where they reasonably believe information is going to be found. If they ultimately determine that after talking to appropriate document custodians and determining, for example, that they don't use text messages for work purposes, it's the -- what this would require us to do is to actually review all text messages and/or all iMessages on the cell phone that is available -- that is used for work purposes regardless of whether or not the custodian says, for example, we actually -- I used text messages to communicate. Again, it's not a question of preservation. If they want to ask during a deposition or the like did you ever use text messages and the custodian says no, well, then we would have undertaken a review that was unnecessary. Our point is we understand our obligations and we will undertake

that as part of a comprehensive discovery plan that requires us to talk to custodians and interview them as to what sorts of media and where their documents and other information are stored, and we will undertake to look at those categories of information, but to have it itemized when in fact it may -- the document custodians may say I never used text messages at all, this would still require me to go look at them.

THE COURT: With -- and I probably need to go back to the original proposed ESI protocol, but maybe you can answer me. Is there anything in your proposed language with respect to cell phone data that limits the application of your proposed language to cell phones -- okay. I see in your, for example, in your sub (b) romanette (i) logs of calls made and voicemails left on a cell phone that the document custodian used for work purposes. The same with (ii), text messages and iMessages on the cell phone device used for work purposes. And then -- but contacts doesn't appear to be limited in that way. Or am I missing something?

MR. POUYA: I do not see it in here today, but to the extent that that needs to be added, we can certainly add it.

But part of what we are concerned about here, Your Honor, is exactly what defense counsel said. You know, it doesn't -- wouldn't surprise you that in a conspiracy case

that a custodian's recollection of whether he used text messages or not is not enough to ensure that those text messages did not exist. We actually want to make sure that the cell phones are searched properly and that we don't get into a situation where something comes out in deposition or a text message that was produced by another defendant and then we have to go back and do further discovery and get into disputes. So that's why this clarity is important.

THE COURT: As I read your paragraph on contacts, I am less convinced now that it was meant to be the third subpart of (b). It looks like it's a stand-alone -- it looks like it's actually a stand-alone separate -- a proposed stand-alone separate requirement to export all relevant contacts on a cell phone for any document custodian to MS Excel with all reasonably available data fields -- am I correct -- and not just a review of contacts for unique, responsive and discoverable information.

MR. POUYA: I don't know standing here today. I believe it was the part -- subpart (iii) relating to cell phone data, but I may be incorrect on that.

THE COURT: Okay. All right. I think I'm going to -- on this particular one, I think I'm going to send you back to meet and confer a bit more on (b) and, you know, (b) (i), (ii), (iii) or (b) (i), (ii) and (c). I think you need to double-check and see what it was meant to be. I told you

where I come down on (a).

With respect to (b), I am inclined to agree that those are pretty noncontroversial and probably also inclined to agree that if a document custodian used a cell phone for work purposes it may not be sufficient to just ask them whether those work purposes, especially if we are talking over a period of several years, ever included text messages on any of the issues that may be involved in this litigation.

So those to me seem fairly noncontroversial, and I would encourage the defendants to go back and talk again about that, figure out what you meant by what's either romanette (iii) or subpart (c), and with a clarified understanding see if you can reach agreement on that.

Since I don't know for sure what was intended and since it looks like it may be broader than anything we have been talking about and certainly broader than any of the qualifiers that we have been talking about so far, you may conclude that needs to be retooled and then see if you can reach agreement with the defendants on that. I don't know where -- otherwise I am not sure where I come out on it right now, but I would like you guys to take a shot instead.

MR. POUYA: Yes, Your Honor.

THE COURT: Okay? Understand?

MS. MILLER: Yes, Your Honor.

THE COURT: All right. Then we get to social media data. And let me get the defendants' counsel up on that one.

MS. MILLER: Yes, Your Honor. Britt Miller.

THE COURT: Okay. In your counter -- and let me give you a page cite. All right. So we are looking at paragraph Roman numeral V(E)(2), and I am specifically referring to Document 233-2, page 3. We have got on the left-hand side the plaintiffs' proposal on social media and then the defendants' counter that social media data are already addressed in V(E)(1)(a). Now, V(E)(1)(a) is the section dealing with cell phone data. And, yes, it does mention that to the extent social media data is on a cell phone it has to be reviewed for discoverable data, but there can be other sources of social media data beyond what's on a cell phone. So I don't see how the reference in --

MS. MILLER: Your Honor, we are certainly happy to try to clarify. The point was the principle is the same, that defendants -- the producing parties will use reasonable due diligence to ensure that reasonably available sources of data, whether that's social media data or on a cell phone and any backups and archives, if those data sources are used for work purposes, are evaluated as a potential source. The reality is social media here is not likely to be a huge source of relevant information. They don't -- the

complaints don't allege conspiracy communications through Facebook Messenger. If anything, they allege public -- the opposite. Public earnings calls are the source of a number of the actual communications that plaintiffs complain of.

Defendants will, of course, look to and, as appropriate, produce their company's own social media content to the extent it is both relevant and responsive. The devil in the details is with respect to individual custodians and whether or not the defendants have control over an individual defendant's Facebook account or their Instagram account, and there could inevitably be proportionality concerns depending on the situations.

Again, once the parties have discussed, as Your Honor has already directed us to, to discuss document custodians, we can then again evaluate for those custodians whether or not this is an issue and whether or not they used social media for business purposes. Many will likely say no. But to the extent there are any that do, we can then look to see whether or not there would be responsive information. But, again, it is the blanket requirement that we affirmatively go and undertake a review of everybody's Facebook account or everybody's, you know, Instagram account in order to do this. We will certainly look, but at least as we understood plaintiffs' proposal it was if someone determines -- if a document custodian confirms that he or

she used it for purposes and used that to communicate, then it's the -- they have to go and -- it must be produced if it's reasonably accessible. Again, we --

THE COURT: And --

MS. MILLER: Yes.

THE COURT: -- in the producing party's possession, custody or control. I mean, that qualifier is there. It is not committing you to gather individual social media data if it's not in your possession, custody or control, and we may have a fun exercise about whether it is or not, but that's going to come regardless. But I guess what I am wondering is, What qualifier isn't here that you're needing?

MS. MILLER: Well, and, again, all of these were interrelated from defendants' standpoint and it was -- we shouldn't be required to undertake this until we get to document custodians. And it was simply an approach to say, Your Honor, we are going to look at all reasonably available sources, but, yes, we do have a possession, custody or control question with respect to social media, which at least the way it was drafted and as we understood it, this was requiring something of us to do right now, to go out and collect social media or determine whether or not, with respect to any number of custodians, whether or not we had this data, which, again, is beyond where we think we need to

do that. Once the parties -- now that the parties have been directed to talk about document custodians, this can be part of the parties' conversation because then we have a better understanding of who really is at issue here, but we can't make essentially ironclad commitments on every single custodian or every single employee at this particular point.

THE COURT: I don't think this is requiring that you actually go out and collect it, process it and produce it right now. I thought that this is just part of the ESI protocol that puts some meat on the bones of what your obligations and their obligations, for that matter, are going to be as discovery unfolds.

MS. MILLER: And again, Your Honor, I think that from our standpoint it was, as defendants read the order and as they read the proposal as a whole, the way -- the whole thing, once you inject these into the remainder of the ESI protocol, that this required some undertaking of us, of defendants at this moment. If Your Honor is simply saying that as part of the discussion of document custodians if defendants determine that in fact that they do have possession, custody or control over a document custodian and that they used social media for business purposes and/or used and -- I am sorry -- and used that social media to communicate with an employee, then we certainly can have those discussions with plaintiffs as to what needs to be

produced. That's not how defendants originally understood in the entirety what plaintiffs were asking us to do.

THE COURT: Okay. Let me ask the plaintiffs then.

MR. POUYA: Your Honor, you are correct on the point that social media is not limited to cell phones, so the cell phone provision doesn't cover this, and we believe that we have already put forward all the qualifiers that are necessary for this to address all of the defendants' concerns. It only applies if the document custodian confirms that social media is used for business purposes and used -- and the social media is used to communicate with an employee of another defendant. And the production obligation only arises if it's reasonably accessible in the producing party's possession, custody or control and not withheld as privileged or as illegal to produce under applicable privacy law.

So we believe it's appropriate to have it in here, just like the other provisions that are already in the ESI protocol, to provide clarity and there is enough qualifiers in here to only apply to social media that would actually be produced within the scope of this litigation.

THE COURT: Okay. And do I understand correctly that this is, other than preservation obligations, which we have talked about and appear to be well understood, that nothing about this is intended to single out social media as

something that the defendants are supposed to go out and immediately start collecting and processing and producing, notwithstanding the pendency of the motions to dismiss?

MR. POUYA: That's correct, Your Honor.

THE COURT: Okay. All right. Well, with that clarification of the proposal -- and that's certainly how I read it -- I believe the necessary qualifiers are there. And I don't see anything in the plaintiffs' proposal that goes beyond what I believe conceptually defendants are already saying they would be and understand they ought to be doing, and I think it's appropriate to have the additional detail to describe that. In some ways I think that the qualifiers are helpful to both sides to make it a little more clear what the obligations are. So I'm agreeing that the -- with the clarification just described, I am agreeing that this proposal can and ought to be included in the ESI protocol.

So with the exception of the additional meeting and conferring on the cell phone data issue, I think you've got what you need to develop a revised joint proposed ESI protocol and to get that me so that we can actually get something on file.

How quickly do you think you would be able to complete that meet and confer process on the cell phone issue and then task someone with the responsibility of

folding it all together and then going back and forth to make sure nothing has gotten accidentally slipped in that shouldn't be?

MS. MILLER: Your Honor, I haven't had an opportunity to --

THE COURT: Do you want to chat? Talk amongst yourselves.

(Attorneys confer.)

MS. MILLER: Your Honor, we're, not surprisingly, not quite there. Plaintiffs would like two weeks. We think given the number of defendants we have to deal with and the possible going back and forth and back and forth it might take an extra week to get it final and submit it to Your Honor, so defendants have suggested three weeks.

THE COURT: I am fine with three weeks. So you have got three weeks to not only complete the meeting and conferring process, but to get me something that reflects your, kind of, final word on what it ought to look like.

Hopefully, there won't be any competing proposals in there; but if there are, I do appreciate the way you have presented them, where you have got the draft proposed protocol, you note where there's -- where there are disputed provisions and then you show me either within the document itself or in a separate chart clearly show me what your respective language is.

Since I think we're kind of down to the short strokes here, I don't think I need pages and pages of discussion of your respective positions. If there are remaining disputes, keep it brief. I think I understand where we are going here. All right?

MS. MILLER: Understood, Your Honor.

THE COURT: Okay. So three weeks from today I will look for that.

Why don't we take a break. I want to think a bit about the remaining issue on requests for production.

And in the meantime I would like you all, after you take a little comfort break, to think about when we should schedule a next conference and what, if anything, ought to happen between now and then.

All right. We will be in recess for 15 minutes.

(Recess taken from 3:27 p.m. till 3:43 p.m.)

THE COURT: Please be seated.

On the issue of requests for production, I am going to require that the process include preparing written objections and responses, now understanding that responses in this instance, we are all in agreement, does not include producing documents, but I think -- I am persuaded that conversations that don't lead towards some specific written product are likely not to be of much use.

So let me talk a little bit about how I think

those responses could be accomplished. I think -- well, what I will require is that defendants take as an assumption in their responses -- and this is by no means a prediction, but you need an assumption to work with, so take as an assumption in your written responses that the motions to dismiss are denied and that Judge Tunheim does not in any significant way limit or de-limit the scope of the litigation. So take that as your underlying assumption in preparing objections and describing in your responses what you will be searching for, reviewing and producing, notwithstanding those objections.

In addition, identify in your responses what issues are pending in the motions to dismiss, short of an outright dismissal altogether, but what issues are pending in the motion to dismiss that are pertinent to those requests and that a ruling by Judge Tunheim could alter the scope of your promise to produce. Identify what those are.

Now, I am not going to require you, at least at this juncture, to say, well, if he decides this, then our position will be that and if he decides this other, then our position will be the other, but at least identify if he decides that exports are out of scope, then that could affect our response to this request. It might not affect all of them. So I don't want to see some boilerplate general objection that identifies all the issues and says to

the extent this request or this response might be affected by this issue, then thus and such. Identify which issues are pending in the motion to dismiss that could affect that response, but I won't require you to go so far as to go down the little decision tree and do the if this/then that, but call out those issues.

Then after you have produced -- or after you have provided those written responses, then it's fair game to meet and confer about that. If plaintiffs want to explore, well, how -- would it affect your position on this if Judge Tunheim did this, that or the other, I think that's fair game for conversation, but I am not going to require you to include it in your written responses at this point.

Any question about what I want to come out of this issue with respect to requests for production?

Obviously, this doesn't include the holding defendants, it does not include the holding defendants, and it only applies to the 32 of the 46 requests that you have said you would discuss.

Questions? Okay.

With respect to timing, obviously, the plaintiffs had proposed some timing back in mid December. It is not mid December anymore, so we probably need to tweak that timing. I am going to require the initial meeting and conferring to be complete by March 8th and the objections

and responses to be provided by three weeks later, which would be March 29th.

So when should we next convene this august group?

MR. ROBISON: Your Honor, during the break counsel for both sides discussed looking at dates the week of April 8th, specifically later in the week. We know there's a particular basketball tournament in town on April 8th. So with certain other conflicts on April 10th, the parties were tentatively looking at afternoon of April 11th or sometime on April 12th.

THE COURT: Okay. Adrienne, are you able to tell?

Hold on a moment. We actually have access to my calendar all the way over in St. Paul.

(Off-record discussion between court and clerk.)

THE COURT: All right. It looks like the afternoon of April 11th, pretty much any time after, say, two, would work for me. And I think April 12th is also open as well.

Do you all have a preference? Do you want to --

MR. ROBISON: I'm getting a very strong vote for the afternoon of April 11th.

THE COURT: All right. So let's say 2:00 central time April 11th.

Let me see what I can do about making arrangements to have it here. I'm actually going to be speaking that

morning at a conference here in Minneapolis, so it may turn out to be convenient for me to be here as well. I'm not making any promises, but we will -- but hold that thought. We will get back to you on location, but on timing we will make it 2:00 on April 12th.

MR. ROBISON: 11th.

THE COURT: I am sorry. April 11th, yes. 2:00, April 11th, Thursday.

We have already talked about getting the, within three weeks, an updated or a revised ESI protocol. I have got a couple of deliverables I need to get out for you.

As far as getting me a status report before the conference, I would like to see an agenda -- I think I would like to see an agenda a week before the conference. If there are any items on the agenda that describe disputes the parties are having, then I would like to get your respective position letters about those disputes at least three business days before the conference. So that would be -- that would be Monday. So if you can get me the agenda by the preceding Thursday and any position letters by Monday, I think that will do it.

MR. CLARK: Okay.

THE COURT: Anything else that I should be asking you for that you really want to get to me that I am not mentioning?

MR. ROBISON: Nothing from the defense side, Your Honor.

MR. CLARK: Nothing further from plaintiffs, Your Honor. Thank you.

THE COURT: All right. Thank you very much. We are adjourned.

Yes?

MS. SCARLETT: We did have the matter of the Agri Stats' Department of Justice documents that we --

THE COURT: Oh, goodness. You are correct. You are correct. I am sorry. I noted that, and I blew right past it.

We're not adjourned yet. Give me one minute.

I hope we didn't lose anybody to whom that was significant on the telephone.

All right. Yeah, we do need to chat about this just a little bit. Hopefully, I won't be keeping you here too much longer.

Who is going to be speaking on behalf of Agri Stats?

MR. BERNICK: I will, Your Honor.

THE COURT: You will. Okay.

MR. BERNICK: This is Justin Bernick from Hogan Lovells on behalf of Agri Stats.

THE COURT: All right. Just a moment. All right.

As I read your position, you're basically saying you're willing to hit the ground running as soon as Judge Tunheim makes a decision, but not willing to do anything by way of reviewing or producing any subset of these documents between now and then. Is that essentially correct?

MR. BERNICK: That's correct, Your Honor. As we discussed in the paper -- it's all there -- the documents that were produced to the Department of Justice related primarily to the chicken industry. And as I believe Your Honor recognized at our last status conference, Agri Stats has no obligation to produce documents that are not relevant to pork in this lawsuit.

So our plan is sort of two prong. There are four custodians out of the approximately 30 DOJ custodians that had some responsibilities related to pork. And we'd review all those documents for responsiveness and produce them if they are responsive to plaintiffs' request. And then the second part would be if the remainder of the custodians -- we would apply whatever search methodology the parties agreed to to those materials and then produce them and that Agri Stats just shouldn't have an obligation that plaintiffs insist on to literally produce every document produced to DOJ in an investigation in a different industry.

THE COURT: Okay. I am inclined at this point to have -- to kind of split the baby on this and have you at

least now, in what we are calling this interim period, review the documents for the four custodians that had responsibilities related to pork and produce the nonprivileged responsive documents from those custodians.

Now, I don't know whether you -- I don't know whether that would involve or whether you and plaintiffs want to talk about the possibility that that involves a conversation with them about a search methodology for those documents, but in the interests of moving things forward in a way that, you know, makes some progress in the case without visiting undue burden that could turn out to be unnecessary, that seems like an appropriate interim step. And then if the case continues, then, yes, work with the plaintiffs to develop a search methodology to search the remaining documents for relevant materials.

With respect to plaintiffs' contention that the entirety of the production to DOJ ought to be produced here, I will simply say that right -- that right now I am not persuaded that it should be and right now I am not saying, you know, that -- right now my vision doesn't include that, but the plaintiffs always have the right to bring a motion to compel. And if, with full briefing by either side, I am persuaded, yes, there is reason to believe that it is relevant and proportional and ought to be produced, we will have that conversation. That needs to be a conversation in

the course of formal motion practice after Judge Tunheim, if at all, after Judge Tunheim has ruled on the motions to dismiss. So don't over-read what I -- what I said about that. I am just saying right now I am not feeling it, but that doesn't preclude plaintiffs from making a motion and changing my mind at the appropriate time.

So that's where I am -- that's where I am coming out on this. Anything I am not understanding that you want to make sure I understand before I make that more definitive?

MR. BERNICK: No. I think we made it clear in our papers that the burden that that would impose on Agri Stats is to review material now, and that's a burden that's not being imposed on anyone else in this case right now. It's actually to review and produce documents. And we haven't heard anything from the plaintiffs to suggest that that's necessary. But we hear you loud and clear. And I think it's helpful, your comments previously, because our primary concern is plaintiffs' requests for literally every single one of these documents, when the thrust of the investigation was in something very different than what the plaintiffs are alleging here, and that's our number one concern coming into this courtroom with our dispute.

THE COURT: Understood.

All right. Anything I ought to be hearing from

plaintiffs before I get more definitive on this subject?

MS. SCARLETT: That proposal would be fine with the plaintiffs, Your Honor.

THE COURT: All right. So why don't you proceed along those lines then. Look at those four custodians, work to develop a search methodology and produce out of that, but we will defer the rest until after the motions to dismiss are decided.

MR. BERNICK: Thank you, Your Honor.

THE COURT: All right. Now are we done?

Thank you for catching that. I appreciate it.

We are again adjourned.

(Court adjourned at 4:00 p.m., 01-28-2019.)

* * *

I, Renee A. Rogge, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR